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## A New Look at Fundamental Human Rights in the European Commission's Investigation Procedure: Joined Cases 46/87 and 227/88

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# A New Look at Fundamental Human Rights in the European Commission's Investigation Procedure. Joined Cases 46/87 and 227/88

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## I. INTRODUCTION

In 1955, six European countries (Belgium, France, Germany, Italy, Luxembourg and the Netherlands) united by signing the Treaty of Rome<sup>1</sup> in order to restore Europe's physical and economic prowess.<sup>2</sup> The signing of the Treaty of Rome created the European Economic

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1. See Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter Treaty of Rome]. In 1973, the group of Member States was enlarged to include Denmark, Ireland, and the United Kingdom. Gordon Slyn, *Aspects of the Law of the European Economic Community*, 18 CORNELL L. REV. 1, 1 (1985). In 1981, Greece became a member, and in June 1986 Spain and Portugal joined membership. *Id.*

2. Slyn *supra* note 1, at 1-2.

Community which had as its primary objective the promoting of a common market enjoying the freedoms of the movement of goods and capital typical of a national system.<sup>3</sup>

The European Court of Justice (ECJ)<sup>4</sup> has overseen a colorful history of protecting the integrity of the European common market. Playing an important role in this history is the European Commission,<sup>5</sup> which has the duty of detecting and preventing market violations as defined by articles 85 and 86 of the Treaty of Rome.<sup>6</sup> The nature and extent of the Commission's investigating and information collecting powers<sup>7</sup> has been a controversial issue, and the subject of much litigation in the European Community.<sup>8</sup> Nevertheless, the ECJ has consistently interpreted the powers under article 14 broadly so as to give due effect to the purpose and scheme of regulation 17.<sup>9</sup>

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3. WILLIAM ALEXANDER, *THE EEC RULES OF COMPETITION* 1 (1979). "One of the fundamental objectives of the [Treaty of Rome] is the establishment of a Common Market within which goods . . . may circulate as freely as within a national market." *Id.*

4. See Treaty of Rome, *supra* note 1, art. 174 (defining the role of the ECJ). The ECJ has exclusive authority to interpret the Treaty of Rome and may review and invalidate findings and acts of the European Commission. *Id.* See generally L. NEVILLE BROWN, *THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES* 1-12 (3d ed. 1989) (discussing the importance of the role of the ECJ in interpreting and applying the Treaty of Rome). See also I D.G. VALENTINE, *THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES* 268-70, 362-63, 422-25 (1965) (providing a comprehensive analysis of the ECJ and its role within the European Community).

5. See Treaty of Rome, *supra* note 1, art. 167(1). The members of the Commission are chosen by joint agreement between the governments of the Member States. *Id.* They are expected to be totally independent of their respective governments and they may not be relieved of their positions, nor hold any other positions. *Id.* art. 158. The Commission is given the responsibility of bringing before the ECJ any undertaking (business) that fails to comply with the provisions of the EEC. *Id.* art. 157. The concept of an undertaking is subject to varying interpretations, see *infra* note 155 and accompanying text (providing a brief overview on the scope of the term undertaking). A detailed review of this concept is beyond the scope of this Casenote.

6. *Id.* arts. 85-86. Article 85 provides in part:

The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development, or investment; [or] (c) share markets or sources of supply

....

*Id.* art. 85. Article 86 provides in part: "Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States . . ." *Id.* art. 86.

7. *Id.* art. 14. Article 14 of regulation 17 of the Treaty of Rome provides that when the Commission is suspicious of anti-competitive practices it may conduct an investigation: (a) to examine books and business records; (b) to take copies; (c) to ask for immediate oral explanations; and (d) to enter any land, premises or methods of transportation of such undertakings. *Id.*

8. Chantal Lavoie, *The Investigative Powers of the Commission with Respect to Business Secrets under Community Competition Rules*, 17 EUR. L. REV. 20, 21 (1992). Some have criticized this power of the Commission by arguing that the powers combine the role of investigator, prosecutor and judge. *Id.* See Debates of the European Parliament, No. 1-253 March 1980, at 34. Among the critics of the Commission's expansive investigatory powers are the Union of Industries of the European Community (UNICE), International Chamber of Commerce (ICC), and the Consultative Committee of Bar Associations of the European Community (CCBE). *Id.* But see, Helmut W. Kreis, *EEC Commission Investigation Procedures in Competition Cases*, 17 INT'L L. 19, 20 (1983) (countering criticism of the Commission's broad power by emphasizing the fairness and accuracy of its investigative process).

9. The purpose of the Commission's powers is outlined in the preamble to regulation 17 which provides that "[I]n order to secure uniform application of Articles 85 and 86 in the common market, rules must be made under which the Commission . . . must have the cooperation of the competent national authorities of the Member

Recently the ECJ re-examined the Commission's investigation procedure in *Hoechst AG v. Commission*,<sup>10</sup> announcing a novel view on Commission powers and the fundamental right of privacy of Community-based undertakings. The *Hoechst* decision impacts both the practitioner or business person with interests in European undertakings, and the Community perception of the application of privacy rights to businesses.

Part II of this note briefly discusses landmark decisions of the ECJ that have affected the Commission's power to investigate businesses suspected of violating Treaty of Rome competition law.<sup>11</sup> Part III sets out the *Hoechst* case and offers an analysis of the ECJ's decision.<sup>12</sup> Part IV is a look at the Advocate General's view of the same case.<sup>13</sup> Part V discusses the impact of the *Hoechst* opinion on the Commission's investigation power, and Community notions of the fundamental right of privacy.<sup>14</sup> Part VI concludes this note with some anticipated and recommended reactions to the *Hoechst* decision.<sup>15</sup>

## II. LEGAL BACKGROUND

### A. Surprise Investigations by the Commission

It is the hope of the Commission, indeed it is the design of its powers under regulation 17, that investigations be conducted in the spirit of mutual cooperation.<sup>16</sup> While most businesses under investigation comply with the Commission's requests for information, more and more businesses are refusing to give the Commission access to their information, thereby questioning the Commission's power of investigation.<sup>17</sup> The Commission is given extensive discovery power under regulation 17.<sup>18</sup>

A relatively recent acknowledgment of the Commission's investigating powers is its ability to order an inspection of business premises without providing prior notice to the firm. Such surprise investigations were upheld by the ECJ in *National Panasonic (UK) Ltd. v. Commission*.<sup>19</sup> In *Panasonic*, the undertaking argued that the Commission's surprise visit infringed upon its fundamental rights, most notably its right of notice and opportunity to be heard.<sup>20</sup> The Commission responded that fundamental rights under the European

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States and be empowered, throughout the common market, to require such information to be supplied and to undertake such investigations as are necessary to bring to light any agreement, decision or concerted practice prohibited by [Articles 85 and 86]." Treaty of Rome, *supra* note 1, reg. 17.

10. Joined cases 46/87 & 227/88, 1989 E.C.R. 2859, 4 C.M.L.R. 410 (1991).

11. See *infra* notes 16-57 and accompanying text.

12. See *infra* notes 58-105 and accompanying text.

13. See *infra* notes 106-27 and accompanying text.

14. See *infra* notes 128-58 and accompanying text.

15. See *infra* notes 159-60 and accompanying text.

16. Lavoie, *supra* note 8, at 20.

17. See, Julian Mathis Joshua, *The Element of Surprise: EEC Competition Investigations under Article 14(3) of Regulation 17*, 8 EUR. L. REV. 3, 3-4 (1983) (arguing that since this type of simple authorization has no obligatory effect on the commercial undertaking, it is naive to suppose that companies with something to hide will forego the chances offered by the procedure to deny access to the incriminating information).

18. See Lavoie, *supra* note 8, at 21 (justifying the reach of these investigations under a public interest analysis, since the public is served by diligent enforcement of competition rules).

19. Case 136/79, 1980 E.C.R. 2033, 3 C.M.L.R. 169 (1980) (upholding the Commission's power to conduct surprise investigations of undertakings suspected of violating articles 85 and 86, but extending a fundamental right of privacy to business premises).

20. *Id.* at 2056-57, para. 17.

Convention "may be interfered with to the extent it is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country . . . or for the protection of the rights and freedoms of others."<sup>21</sup> For that reason, and to give due effect to the function of the Commission's investigatory powers, Panasonic's argument was rejected.<sup>22</sup>

While Panasonic, as the undertaking, argued that such unannounced visits are unnecessarily intrusive of business activities, the notion that the element of surprise is essential for the successful application of EEC competition law prevailed.<sup>23</sup>

*Panasonic* marked the reversal of the 1976 Bar and Law Society Joint Working Party recommendation of providing adequate notice to businesses before the investigation.<sup>24</sup> While the applicant in *Panasonic* sought to limit the Commission's use of surprise investigations to circumstances of extreme gravity, the result resounded with the notion that surprise is essential where the possibility exists that the business concerned will attempt to frustrate the purpose of the inquiry by removing or destroying incriminating records.<sup>25</sup> While the ECJ recognized an extension of the right of privacy in the home, to the business premise, it nevertheless found that the surprise procedures did not infringe upon those rights.<sup>26</sup> The extension of this privacy was seemingly premised on the European Convention of Human Rights.<sup>27</sup>

There were several factors that led up to the *Panasonic* decision, including increased resistance by undertakings and their advisors to investigations.<sup>28</sup> The ease with which incriminating evidence may be concealed, along with the inadequacies of some of the Commission's past fact-findings, were also considerations of the ECJ in reaching its decision.<sup>29</sup>

By refusing to confine the Commission's power to order surprise investigations to exceptional circumstances, the ECJ in *Panasonic* added an important weapon to the Commission's arsenal of investigatory powers. Nevertheless, the vast majority of investigations are still carried out by appointment, thereby giving adequate notice to the undertaking.<sup>30</sup> Under article 14, the Commission has discretion to proceed by surprise.<sup>31</sup> The ECJ in *Panasonic* held that the Commission need not begin its investigations by requesting information, but rather may immediately exercise its full investigatory powers under article 14, thereby refusing to require the Commission to pursue the least intrusive means.<sup>32</sup>

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21. *Id.* at 2057, para. 19.

22. *Id.* at 2058-59, para. 23.

23. *Id.* at 2060, para. 29.

24. Joshua, *supra* note 17, at 3.

25. Kreis, *supra* note 8, at 46.

26. *Panasonic*, 1980 E.C.R. at 2045.

27. *Id.*

28. Joshua, *supra* note 17, at 4-5.

29. *Id.* at 5-6.

30. *Id.*

31. *Panasonic*, 1980 E.C.R. at 2055, para. 12.

32. *Id.* at 2056, paras. 15-16.

B. *Protection of Lawyer-Client Communications in Commission Proceedings*

In *AM&S Europe Ltd. v. Commission*,<sup>33</sup> the ECJ addressed perhaps the most debated issue surrounding the Commission's powers.<sup>34</sup> In *AM&S*, the ECJ decided to extend protection under the EEC law to lawyer-client communications.<sup>35</sup> Not only does the recognized privilege in *AM&S* cover all written communications with a lawyer exchanged after the initiation of a Commission procedure, but it also encompasses communications between a client and a class of independent EEC lawyers before any proceeding by the Commission.<sup>36</sup> However, since the lawyers must be entitled to practice before the courts of a Member State, U.S. attorneys in Europe are not included in the coverage.<sup>37</sup> While this rule of confidentiality came from English law, an adversarial system, its present Community application is to Commission proceedings, an information gathering device.<sup>38</sup> This incongruity has led some to suggest that where the exercise of the privilege leads to the frustration of the Commission's investigations, it should not be recognized.<sup>39</sup>

In *AM&S*, the ECJ decided that it was for the Commission, and not the undertaking or a third party, to decide whether a particular document had to be produced.<sup>40</sup> Therefore, it is the undertaking's burden to prove to the investigator's satisfaction that the requested evidence is confidential. If the undertaking fails to convince the Commission that the undertaking is not bound to disclose a particular item of information, then it is for the ECJ to determine whether disclosure is required.<sup>41</sup>

C. *Protection of Business Secrets in Commission Proceedings*

In *AKZO Chemie BV v. Commission*,<sup>42</sup> the ECJ considered an issue similar to the one encountered in the *AM&S* case. In *AKZO*, the Commission conveyed documents received by the applicant (AKZO) to the complainant (ECS).<sup>43</sup> AKZO alleged that the Commission breached its duty of confidentiality by disclosing the documents which should have been protected as business secrets.<sup>44</sup> The Commission's primary defense was that the

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33. Case 155/79, 1982 E.C.R. 1575, 2 C.M.L.R. 264 (1982) (recognizing a protection of attorney-client communications during the investigation of an undertaking suspected of conduct violating Community competition rules).

34. J.M. Joshua, *Information in EEC Competition Procedures*, 11 EUR. L. REV. 409, 423 (1986) (noting that the issues raised in *AM&S* regarding protection of attorney-client communications have opened a veritable Pandora's Box).

35. *AM&S*, 1982 E.C.R. at 1590, para. 14.

36. *Id.* In this sense the protections afforded these confidential communications is broader than that under the American work product privilege. Joshua, *supra* note 34, at 423. The policy for this rule is obviously to promote candor in legal counseling. *Id.* at 424.

37. Joshua, *supra* note 34, at 423.

38. *Id.* at 425.

39. *Id.*

40. *Id.*

41. *AM&S*, 1982 E.C.R. at 1591, para. 16.

42. Case 53/85, 1986 E.C.R. 1965, 1 C.M.L.R. 231 (1986) (involving the Commission's disclosure of documents that allegedly contained business secrets). The Commission published material it seized during an investigation of alleged violations of Community competition law by a chemical undertaking. *Id.* at 1988, para. 11.

43. *Id.*

44. *Id.* at 1989, para. 24.

investigation was only at an interlocutory stage in the procedure and that therefore the decision ordering the investigation was not yet susceptible to an appeal to the ECJ.<sup>45</sup> However, the ECJ never reached the issue of whether the information disclosed was indeed a secret, or whether it was adequately safeguarded by the Commission.<sup>46</sup> Rather, the ECJ resolved the issue on the ground that the Commission did not give applicant AKZO sufficient opportunity to appeal the Commission's decision to publish the alleged business secrets.<sup>47</sup>

At least one commentator fears that AKZO creates just another avenue for non-complying undertakings to delay the already protracted investigative proceedings.<sup>48</sup> This concern seems to have its roots in the notion that allowing an interim appeal encourages unmeritorious claims by an undertaking.<sup>49</sup> Undertakings may appeal the Commission's decision to disclose documents to a complainant solely to prolong its opportunity to hide incriminating evidence.<sup>50</sup> While this may create another loophole for evasive undertakings, another commentator has claimed that the ECJ's regulations of business secrets, as enunciated in AKZO, are an adequate compromise between the competing interests of business privacy and competition law enforcement.<sup>51</sup>

Just what entails a business secret is still far from settled, it is in any event for the Commission to decide.<sup>52</sup> While the Commission may investigate these secret materials, according to AKZO, the undertaking is sufficiently safeguarded by the Commission's protections against public disclosure of the material.<sup>53</sup>

AKZO in effect bifurcated the standard of protection the Commission is to afford business secrets in publication of their findings.<sup>54</sup> The opinion of Advocate General Lenz stated that alleged secrets containing proof of suspected competition violations are protected throughout formal proceedings since no decision has yet been reached on the violation.<sup>55</sup> However, the publication of a business secret is at least possible where it constitutes evidence of an infringement as determined by the Commission.<sup>56</sup>

The tension between business rights and the Commission's Community mandate is readily apparent from even these few cases. While the European Court has extended some

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45. *Id.* at 1989, para. 14.

46. *Id.* at 1993, para. 31.

47. *Id.*

48. Joshua, *supra* note 34, at 422.

49. *Id.*

50. *Id.* This may be a very effective tactic for delay. *Id.* An appeal may be lodged any time within two months after the decision is rendered. *Id.* Additionally, it may take a year or longer for the ECJ to hear the matter. *Id.*

51. See Lavoie, *supra* note 8, at 40, (arguing that the current treatment of business secrets strikes an appropriate balance in bringing to light infringements of competition law policy while protecting fundamental rights in the process).

52. AKZO, 1986 E.C.R. at 1992, para. 29.

53. *Id.* para. 28. See Lavoie, *supra* note 8, at 39 (suggesting that the current balance is appropriate, and that stricter limitations would significantly impair the Commission's ability to enforce competition law).

54. Lavoie, *supra* note 8, at 38-39.

55. AKZO, 1986 E.C.R. at 1992, para. 28.

56. See *id.* (holding that the legitimate interest in protecting the business secret may be lost once the Community has made its decision and found competition rules have effectively been violated).

vital concessions to shield undertakings under investigation, it has been at least equally generous in its arming of the Commission.<sup>57</sup>

### III. THE CASE

#### A. The Facts

Hoechst AG, a German company involved in the chemical industry, produces and markets PVC and polyethylene.<sup>58</sup> The Commission suspected that industry of involvement in price fixing and delivery quotas in violation of Community articles 85 and 86.<sup>59</sup> The Commission decided to conduct an investigation of Hoechst. On January 20, 1987 Commission officials appeared unannounced on the Hoechst business premises.<sup>60</sup> They were accompanied by a representative of the Bundeskartellamt (Federal Cartel Office), the German authority competent in competition matters.<sup>61</sup> The Hoechst representative refused to submit to the investigation in the absence of a prior judicial warrant.<sup>62</sup>

Two days later, the Commission made a second attempt, again accompanied by a member of the Bundeskartellamt, but was again denied access.<sup>63</sup> After a third such failure, the Commission notified Hoechst that it would be subject to a penalty of 1,000 EC unit, (ECUs)<sup>64</sup> for each day it refused to consent to the investigation. On February 3, 1987, it began imposing the penalty on Hoechst.<sup>65</sup>

The Amtsgericht Frankfurt (local court) denied the Bundeskartellamt's application for a search warrant for the Hoechst premises stating that there were no facts to justify the suspicion that Hoechst violated EEC competition regulations.<sup>66</sup> On March 26, 1987, the ECJ denied Hoechst's application for interim relief suspending the operation of the investigation decision and penalty.<sup>67</sup> Five days later, the Bundeskartellamt obtained from the Amtsgericht Frankfurt a search warrant issued directly in the name of the Commission.<sup>68</sup> On the Commission's next attempt the Hoechst representative submitted

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57. See Frances Graupner, *The Investigatory Powers of the European Commission in Anti-Trust cases*, 16 INT'L BUS. L. 93, 93 (1988) (noting the Commission's increased vigor and resourcefulness when investigating alleged competition infringements).

58. Joined cases 46/87 & 227/88, *Hoechst AG v. Commission*, 1989 E.C.R. 2859, 2863, 4 C.M.L.R. 410 (1991) (Hearing Rep.).

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Hoechst*, 1989 E.C.R. at 2864 (Hearing Rep.).

64. *Id.* One ECU represents the value of 0.88867088 grams of fine gold.

65. *Hoechst*, 1989 E.C.R. at 2864 (Hearing Rep.). The penalty was finally fixed at 55,000 ECUs. *Id.* at 2876, para. 5 (Adv. Gen. Op.). The fines levied on the 15 petrochemical producers in *In re Polypropylene Cartel*, 1986 O.J. (L 230) 1, 4 C.M.L.R. 347 (1986), totalled \$ 58 million U.S. dollars. Julian Mathie Joshua, *Proof in Contested EEC Competition Cases: A Comparison with the Rules of Evidence in Common Law*, 12 EUR. L. REV. 315, 315 n.3 (1987). "The highest individualized fine was \$11 million." *Id.* It has been suggested that 1,000 ECUs per day is a trifling sum for a company the size of Hoechst. Josephine Shaw, *Commission Investigation Procedures Protected*, 12 EUR. L. REV. 457, 460 (1987).

66. *Hoechst*, 1989 E.C.R. at 2864 (Hearing Rep.).

67. *Id.*

68. *Id.*



to the procedure because of the Commission's search warrant.<sup>69</sup> Over the next two days the Commission proceeded with its investigation.<sup>70</sup>

### *B. Procedural Aspects*

Hoechst brought actions under EEC article 173 to have the ECJ declare void the Commission's decisions to conduct an investigation and to penalize the undertaking.<sup>71</sup> EEC article 173 provides in part that "the Court of Justice shall determine upon the legality of the acts . . . of the Commission. [I]t is competent to pronounce upon appeals for incompetence, violation of a substantial procedural requirement, violation of the present treaty . . . brought by a member state, the Council or the Commission. Any other natural or legal person may, under the same conditions, bring an appeal . . ."<sup>72</sup>

Two days after the action was filed under article 173, Hoechst brought another action seeking relief by way of a stay of execution. This action was brought under article 185 of the Treaty of Rome.<sup>73</sup> The ECJ joined the two cases.<sup>74</sup>

According to article 83(2) of the European Court's Rules of Procedure, in order to obtain such interim relief as prayed for under EEC article 185, Hoechst is required to state the subject matter of the dispute, the circumstances giving rise to the urgency, and the factual and legal grounds establishing a *prima facie* case for the interim measures requested.<sup>75</sup> Urgency, in this context, has consistently been interpreted as placing a burden on the applicant to show it will suffer serious harm if the interim relief is not awarded.<sup>76</sup>

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69. *Id.*

70. *Id.*

71. *Hoechst*, 1989 E.C.R. at 2864 (Hearing Rep.). Hoechst in its article 173 action against the Commission, alleging a fundamental right infringement. *Id.* at 2866. The fundamental right Hoechst relied on was the inviolability of the home. *Id.* Hoechst argued that this right also applied to business premises. *Id.* at 2868. An additional basis for Hoechst's article 173 action was a procedural argument. *Id.* at 2866. Hoechst's procedural claim was that the Commission's statement of reasons in support of the attempted investigation was defective. *Id.*

72. Treaty of Rome, *supra* note 1, art. 173. Article 173 allows for judicial review by the ECJ of the Commission's acts. *Id.* The right of judicial review exists with respect to all decisions affecting an interest of an undertaking. *Id.* A successful appeal must be predicated on one of four grounds specified in article 173: (1) lack of competence; (2) infringement of an essential procedural requirement (e.g. failure to state adequate reasons); (3) infringement of the Treaty; and (4) misuse of powers. ALEXANDER, *supra* note 3, at 42.

73. Shaw, *supra* note 65, at 458. The ECJ has the power to cancel, reduce or increase the fine, upon an appeal which must be lodged within two months of notification to the plaintiff. ALEXANDER, *supra* note 3, at 42. While there are no explicit suspending powers, under certain circumstances the ECJ may suspend the contested act. *Id.* at 43.

74. *Hoechst*, 1989 E.C.R. at 2864 (Hearing Rep.).

75. Treaty of Rome, *supra* note 1, art. 185.

76. Josephine Shaw, *Recent Developments in the Field of Competition Procedure*, 15 EUR. L. REV. 326, 329 (1990).

### C. The Opinion

#### 1. The Commission's Power of Search

Hoechst challenged the Commission's authority to carry out this investigation arguing that such investigation rises to the level of a search, a level of intrusion not provided for under article 14 or regulation 17.<sup>77</sup> Hoechst argued that if regulation 17 is construed so as to allow a search then the provision is unlawful as it violates fundamental rights, the protection of which demand the issuance of a warrant.<sup>78</sup> The Commission contended that while their investigations may rise to the level of a search as defined by various member states, the business' interest is sufficiently safeguarded by the administrative avenues allowing the business to contest the decision ordering the investigation, and applying for interim relief to the ECJ. The Commission suggested that such protections are the functional equivalent of a warrant, and therefore the undertaking's fundamental rights were not impinged.<sup>79</sup>

The ECJ adopted the Commission's argument and responded that article 14 gives the Commission as much power as necessary to enable it to carry out its duty under the Treaty of Rome of ensuring that the rules of competition are applied in the Common Market.<sup>80</sup> The ECJ admitted that the scope of investigations may be very wide<sup>81</sup> and that the right of access afforded the Commission implies its power to search for various items of information which are not already known or which have not been fully identified.<sup>82</sup>

Hoechst countered that any authorization of a search power to the Commission is incompatible with fundamental human rights which require that searches be conducted only on the basis of a prior judicial warrant.<sup>83</sup> While Hoechst relied on rights extending from the Community-recognized fundamental right of inviolability of the home, the ECJ refused to extend that protection to an undertaking.<sup>84</sup> The ECJ did not feel compelled to analogize the privacy interests of a business with that of a home because it found considerable divergences between the legal systems of the member states in regard to the nature and degree of protection afforded to business premises against intervention by the public

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77. *Hoechst*, 1989 E.C.R. at 2922, para. 10. There has been considerable discussion as to whether inspectors have the power of search. Joshua, *supra* note 17, at 9-10. Under article 14(3) the Commission has power to access all premises and can examine all business records of the undertaking. *Id.* At least one commentator has suggested that because article 14(3) states that an undertaking "shall submit" to a decision ordering an investigation, that the undertaking has no duty to cooperate with the officials, who must therefore have the power of search. *Id.* A more widely adopted view is that undertakings have a positive duty to cooperate in the investigations, and that officials may not proceed against its will as they could with a search warrant. *Id.* Absent local authority, the Commission is only empowered to compel cooperation through the administration of a periodic penalty under articles 15(1)(c) and 16(1)(d). *Id.*

78. *Hoechst*, 1989 E.C.R. at 2922, para. 10.

79. *Id.* at para. 11.

80. *Id.* at 2926, para. 25.

81. *Id.* at para. 26.

82. *Id.* at para. 27.

83. *Hoechst*, 1989 E.C.R. at 2922, para. 10.

84. *Id.* at 2924, para. 17.

authorities.<sup>85</sup> Further, the ECJ saw no need to expand the scope of the right articulated in article 8(1) of the European Convention of Human Rights beyond its plain meaning.<sup>86</sup>

The ECJ concluded that natural or legal persons must be protected against arbitrary or disproportionate intervention by the Community, a principle common to all the legal systems of the Member States.<sup>87</sup> The ECJ suggested that an undertaking's privacy interests are sufficiently safeguarded, even in the absence of a prior judicial warrant, because of several characteristics and limitations of the Commission's power. First, the undertakings are able to assess and limit the scope of the Commission's intrusion, and therefore their duty to cooperate with the Commission, because of the fundamental requirement that the Commission specify the subject matter and the purpose of the investigation.<sup>88</sup>

Second, article 14 of regulation 17 is premised on the notion of voluntary cooperation between the undertaking and the Commission. The Commission does not have the power in itself to force or compel an investigation or an entry. Of course, if the business expresses its opposition under article 14(6), the Commission may retain assistance of the relevant national authorities in order to compel compliance.<sup>89</sup> Yet, the ECJ stated that "it is for each member state to determine the conditions under which the national authorities will afford assistance to the Commission's officials,"<sup>90</sup> thereby ensuring the Commission's respect of the relevant procedural guarantees prescribed by national law.<sup>91</sup>

But what the ECJ gives with one hand it seems to take away with the other, since local authorities are required to render assistance to the Commission when called on to do so.<sup>92</sup> Therefore, the local authority may not substitute its own assessment of the need for the investigation ordered by the Commission. The Commission's decision is only reviewable by the ECJ.<sup>93</sup> The local authorities are confined to an inquiry as to whether the Commission's decision to order the investigation is authentic, and whether the intrusion envisaged is arbitrary or excessive with regard to the subject matter.<sup>94</sup> The Commission's mistaken belief, as evidenced by its arguments, that they were entitled to carry out searches without respect to procedural guarantees provided for under national law, did not compromise the legality of their actions.<sup>95</sup> The ECJ therefore ruled that the Commission did not exceed its powers.<sup>96</sup>

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85. *Id.*

86. *Id.* at para. 18. Article 8(1) of the European Convention of Human Rights states that "[e]veryone has the right to respect for his private and family life, his home and his correspondence." Y.B. EUR. CONV. ON H.R. art. 8(1).

87. *Hoechst*, 1989 E.C.R. at 2924, para. 19.

88. *Id.* at 2927, para. 29.

89. *Id.* at 2927-28, para. 32.

90. *Id.* at 2928, para. 33.

91. *Id.*

92. Treaty of Rome, *supra* note 1, art. 14(6). Article 14(6) provides that where an undertaking opposes an investigation ordered pursuant to this article, the Member State concerned shall afford the necessary assistance to the officials authorized by the Commission to enable them to make their investigation. *Id.*

93. ALEXANDER, *supra* note 3, at 42.

94. *Hoechst*, 1989 E.C.R. at 2928, para. 35.

95. *Id.* at 2929, para. 37.

96. *Id.* at para. 33.

## 2. The Statement of Reasons Requirement

Hoechst's next argument was that the decision ordering the investigation was invalid because the Commission's statement of reasons for the search was too imprecise, in regard to the subject matter and purpose of the investigation.<sup>97</sup>

While recognizing that the statement of reasons used in the Commission's decision was drawn up in very general terms, the ECJ nevertheless upheld the statement because it contained the essential criteria of article 14(3).<sup>98</sup> Under that article, the statement of reasons requirement may be satisfied by relatively imprecise wording. It is not necessary to define the relevant market where the illegal activity took place, give a precise legal description of the complained of acts, or indicate the period during which those acts are said to have been committed. The looseness of this requirement is justified on the grounds that the purpose of the investigation is simply to discover facts. Therefore, requiring specificity of the Commission's suspicion places an undue burden on the Commission and may frustrate their fact-finding mission.<sup>99</sup>

## 3. The Periodic Penalty

Hoechst next argued that the Commission's decision to impose a periodic penalty payment on the business was invalid because the Commission did not first give Hoechst the opportunity to be heard, nor did it consult the Advisory Committee on Restrictive Practices and Dominant Positions.<sup>100</sup> The ECJ summarily dispensed with this argument, holding that there was no breach of essential procedural requirements.<sup>101</sup> However, the ECJ did admit that under article 19(1) of regulation 17 the undertaking must be given the opportunity to be heard on the matters of the Commission's complaints before a decision is made, including decisions outlined in article 16 concerning periodic payments.<sup>102</sup>

Critical to the ECJ's finding is its recognition that there are two stages to the periodic penalty.<sup>103</sup> The first stage commences the day to day accrual and the second determines the total amount of the penalty. It was sufficient to the ECJ that the Commission conducted a hearing before fixing the definitive amount of the penalty, whereas no similar procedural requirement is demanded by the decision to accrue the penalty.<sup>104</sup> Thus, the ECJ rejected Hoechst's application for a declaration voiding the Commission's periodic penalty.<sup>105</sup>

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97. *Id.* at para. 39.

98. *Id.* at 2930, para. 42.

99. *Hoechst*, 1989 E.C.R. at 2929-30, paras. 39-42. Based on article 14(3) the ECJ held that the statement of reasons shall specify the subject matter and the purpose of the investigation, appoint the date on which it is to begin, indicate the penalties provided for in articles 15(1)(c) and 16(1)(d), and the existence of the right to have the decision reviewed by the ECJ. *Id.*

100. *Id.* at 2932, para. 54. According to article one of regulation No. 99/63, before consulting the Advisory Committee on Restrictive Practices and Dominant Positions, the Commission shall hold a hearing pursuant to article 19(1) of regulation 17. *Id.* The provisions of article 1 of regulation No. 99/63 confirm that the hearing and the consultation of the Advisory Committee are required in the same situations. *Id.*

101. *Hoechst*, 1989 E.C.R. at 2930-31, paras. 44-49.

102. *Id.* at 2932, para. 51.

103. *Id.* at para. 55.

104. *Id.* at 2933, para. 57.

105. *Id.* at para. 58.

#### IV. THE ADVOCATE GENERAL'S OPINION

The Advocate General is required to offer an impartial opinion to the ECJ prior to its decision.<sup>106</sup> While the ECJ is not bound by the Advocate General's opinion, it provides valuable insight into Community law and is often persuasive.<sup>107</sup>

##### A. *The Extent of the Commission's Power*

The opinion of the European Court of Justice roughly follows the opinion of Mr. Advocate General Mischo in this case. However, there are subtle discrepancies in their views of the Commission's powers. The Advocate General would seemingly allow even more expansive searches than those conducted and upheld in *Hoechst*. The Advocate General argued that the text of article 14 itself suggests that undertakings have a duty to cooperate in the investigation by furnishing explanations and producing all requested documents.<sup>108</sup> Where undertakings comply with their duty by providing the requested information, no search has taken place.<sup>109</sup> In defining the scope of the investigation, the Advocate General acknowledged the Commission's broad power and duty to undertake all necessary investigations.<sup>110</sup> Because of the inherent difficulty in discovering evidence of article 85 and 86 violations, the Advocate General suggested that Commission officials were also entitled to look into the manager's briefcases, and even into their diaries to see if they contain documents or indications relating to business activities.<sup>111</sup>

The Advocate General went on to say that the Commission is authorized to see all documents of an undertaking, even those claimed to be privileged by an attorney-client relationship.<sup>112</sup> As incriminating information is often evasive, searches cannot be narrowly or specifically construed, and so the expanse of investigations should only be limited by the Commission's own judgment or ECJ review.<sup>113</sup> The Commission's officials must certainly be given every facility to ensure that no document of relevance escapes their scrutiny.<sup>114</sup>

The Advocate General rejected Hoechst's argument that an undertaking's submission to requests for documents, where the particular nature of the requested document is unknown, is a search.<sup>115</sup> However, the Advocate General recognized that the Commission is powerless to directly enforce the investigation without local help.<sup>116</sup> Local authorities may only use force to compel an investigation under the conditions provided by the laws of their own Member State.<sup>117</sup>

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106. GERHARD BEBR, DEVELOPMENT OF JUDICIAL CONTROL OF THE EUROPEAN COMMUNITIES 8-9 (1989).

107. *Id.*

108. *Hoechst*, 1989 E.C.R. at 2878, para. 16 (Adv. Gen. Op.).

109. *Id.*

110. *Id.* at para. 19.

111. *Id.* at 2879, para 23.

112. *Id.* at 2880, para. 27.

113. *Hoechst*, 1989 E.R.C. at 2879, para. 24 (Adv. Gen. Op.).

114. *Id.* at 2882, para. 36.

115. *Id.* at 2896, para. 124.

116. *Id.* at 2895, para. 117.

117. *Id.* at 2896, para. 120.

*B. The Right to the Inviolability of the Premise*

The Advocate General concluded, from a comparison of National Legislation and ECJ precedent, that the exercise of powers pursuant to regulation 17, even under the threat of a periodic penalty payment, does not violate the principle of inviolability of the home. The Advocate General compared the various member states' positions on the extension of the right to the inviolability of the home to legal entities, and, like the ECJ, noted some discrepancies, however, the Advocate General discerned a general trend of Member State's willingness to assimilate protections of a business premise to that of a home.<sup>118</sup> This finding marks one of the larger distinctions between General Mischo's opinion and that adopted by the ECJ. This acknowledgment on a Community level of a fundamental right to the inviolability of the home analogized to an undertaking is not completely novel, however. The ECJ has previously extended that right to business premises.<sup>119</sup> The Advocate General's conclusion is nevertheless consistent with the ECJ's as he holds that the exercise of the Commission's powers under article 14(3) did not violate the fundamental right of business privacy.<sup>120</sup> While the Advocate General emphasized that the investigation procedure is premised on cooperation,<sup>121</sup> the undertaking's rights were sufficiently safeguarded by its opportunity to contest the Commission's decisions at the ECJ.<sup>122</sup>

*C. The Uncertain Future of Commission Investigations*

Lastly, the Advocate General expressed his fear of the ramifications of Hoechst's example, stating that up until this time the operations of article 14 have been relatively smooth as most businesses had consented to the investigations. But he predicted that article 14 investigations may prove inoperable if others follow Hoechst's example and proliferate formal objections within the system.<sup>123</sup> When faced with a non-consenting business the Advocate General feared the Commission would lose the advantage of surprise, and its efforts to discover the elusive evidence would be frustrated.<sup>124</sup> The Advocate General suggested that the Commission officials obtain a search warrant from the local authorities in advance so that they will be able to conduct an immediate investigation even in the face of an unwilling host.<sup>125</sup> However, he recommended that it would be preferable to have the ECJ issue the necessary warrants instead of the national authorities.<sup>126</sup> Such a procedure would dispense with the cumbersome interim relief and suspension hearings and would also streamline the effectiveness of simultaneous inter-state investigations.<sup>127</sup>

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118. *Hoechst*, 1989 E.C.R. at 2893, para. 103 (Adv. Gen. Op.).

119. See Case 31/59, *Acciaieria e Tubificati di Brescia v. High Authority*, 1960 E.C.R. 71, 80 (1960) (extending the right of privacy to business premises whether those of an individual or a company).

120. *Id.* at 2895, para. 116.

121. *Id.* at 2895, para. 117.

122. *Id.* at 2895, at para. 118.

123. *Hoechst*, 1989 E.C.R. at 2900, para. 144 (Ad. Gen. Op.).

124. *Id.*

125. *Id.* at para. 145.

126. *Id.* at para. 146.

127. *Id.* at paras. 147-48.

## V. LEGAL RAMIFICATIONS

### A. The Hoechst Decision: Friend or Foe of the Undertakings?

*Hoechst* presented the first opportunity the ECJ had to deal with an undertaking's attempt to obtain interim relief against a decision ordering it to submit to an investigation.<sup>128</sup> However, it will not be the last time the ECJ is faced with a similar task. It may be as the Advocate General feared, that undertakings may begin to follow *Hoechst*'s example by proliferating interim relief proceedings to the ECJ. Thereby inhibiting the efficiency of the Commission's investigatory powers.

On the other hand, this decision may be viewed as a victory for the Commission in its efforts to enforce articles 85 and 86 in the Community. *Hoechst* is an example of the continuing resourcefulness of the Commission and the ECJ in their detection of anti-competitive business behavior.<sup>129</sup> The Commission surely has a strong interest in the efficient and speedy prosecution of competition proceedings, but this increased vigor by the Commission will perhaps be met with more and more challenges by undertakings like *Hoechst*, who may feel the investigations are infringing on their fundamental rights.

The *Hoechst* decision may have its greatest impact upon the ECJ's view of the fundamental human rights of the citizens of the Member States, which despite their importance in the world today, have only recently come to play a significant role in Community law.<sup>130</sup> *Hoechst* represents an important development in the Community perspective of human rights law. Indeed, *Hoechst* is more meaningful for what it refuses to do rather than what it does. *Hoechst* refused to extend fundamental rights of inviolability of the home to undertakings, without presenting a meaningful distinction between the privacy interests of a person while at work, or while at home. It seems as though the ECJ is waiting for the European Court of Human Rights to make the first move on this issue.<sup>131</sup>

Nevertheless, *Hoechst* struck at least partly in favor of protecting an undertaking's right to privacy as it required the Commission's compliance with relevant national procedural safeguards governing searches.<sup>132</sup> The importance of this holding is highlighted by the fact that the Commission did not feel its compliance with these national safeguards was required.<sup>133</sup> While this decision did not affect *Hoechst* directly, as the Commission had obtained a warrant, in the future it may provide a significant safeguard for other undertakings, and substantial fodder for future decisions.

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128. Shaw, *supra* note 65, at 460.

129. *Id.*

130. See T.C. HARTLEY, THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW 122 (2d. ed. 1988) (outlining the relatively recent history of fundamental human rights in the European Community).

131. *Hoechst*, 1989 E.C.R. at 2924, para 18.

132. *Id.* at 2928, para. 33. It follows from article 14(6) that it is for each Member State to determine the conditions under which the national authorities will afford assistance to the Commission's officials. *Id.* While the Member State's discretion in lending aid to officials is somewhat limited, they are entitled to lay down national laws, within Community boundaries, to ensure respect for undertaking's rights. *Id.*

133. *Hoechst*, 1989 E.C.R. at 2929, para. 37. During the proceedings before the Court, the Commission argued that its officials are entitled, when making investigations, to carry out searches without the assistance of the national authorities and without respecting the procedural guarantees provided for under national law. *Id.* However, that misinterpretation of article 14 of regulation No. 17 did not render unlawful the decisions adopted on the basis of that provision. *Id.*

It may appear that the Commission's duty to adhere to the relevant national procedures of the Member State involved, results in disproportionate treatment among the Member States. Placing Community law enforcement, in this respect, contingent on national law, may therefore prove too unsteady for lasting application. Further, the deference to various national laws seems to run contrary to the notions of the supremacy as well as uniformity of Community law. Therefore, the ECJ will probably dispense with this procedure if it has the effect of frustrating the goals of the Commission in its investigations. Indeed, such a modification would be in line with the historical response of the ECJ.<sup>134</sup>

### B. The Effect on Fundamental Human Rights in Europe

It is interesting to note that the ECJ's recognition of fundamental human rights has come primarily at the urging of the Germans.<sup>135</sup> It is no coincidence that the strongest criticism of the Commission's powers comes from countries whose tradition, like Germany's, is based on common law.<sup>136</sup> These countries' criticisms derive from a strong feeling of fairness, legal protection, and legal certainty in public intervention measures.<sup>137</sup> Since the early days of the Community, German lawyers have had their doubts as to whether Community law should prevail over the provisions of their German Constitution (*Grundgesetz*), especially those areas concerning fundamental human rights.<sup>138</sup> Germany's strong commitment to fundamental human rights is of course understandable in light of its recent history. It is equally understandable that German lawyers would expect their constitutional rights to be recognized by the ECJ, as all German laws are subordinate to their Constitution.<sup>139</sup>

The Community does not have an enumerated catalog of human rights.<sup>140</sup> Rather, recognition of those fundamental human rights (or natural justice) is inspired by common philosophies rooted in Member States' legal traditions.

In *Nold v. Commission*,<sup>141</sup> the ECJ held that in safeguarding fundamental human rights, it is bound to draw inspiration from constitutional traditions common to the member states.<sup>142</sup> The Advocate General's opinion in *IRCA v. Commission*<sup>143</sup> suggests that the

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134. See generally, PETER OLIVER, *FREE MOVEMENT OF GOODS IN THE EEC* 126-71 (1982). The ECJ, in seeking uniform application of article 36, governing the free movement of goods within the EEC, among the various Member States, has struck down national legislation that burdened the Community goal enunciated in that article. *Id.* at 127-37. The ECJ has developed a uniform standard of conduct by which to measure the compliance of Member States in this area. *Id.* at 127-37. See Case 178/84, *Commission v. Germany*, 1987 E.C.R. 1227, 1 C.M.L.R. 780 (1987) (striking down national legislation based on alleged consumer protection, in order to promote the free movement of goods in the Community).

135. See Case 29/69, *Stauder v. City of Ulm*, 1969 E.C.R. 419, XX C.M.L.R. 42 (1969) (recognizing a fundamental right to privacy in social security legislation, where a German refused to give his name and address on a coupon for butter, claiming it violated his right of privacy).

136. Kreis, *supra* note 8, at 21.

137. *Id.*

138. HARTLEY, *supra* note 130, at 122.

139. *Id.*

140. See generally A.H. ROBERTSON, *PRIVACY AND HUMAN RIGHTS* (1973) (providing an excellent description of the early treatment of human rights in the European Community).

141. Case 4/73, *Nold v. Commission*, 1974 E.C.R. 491, 2 C.M.L.R. 338 (1974) (recognizing that fundamental human rights are to be protected by the Community and that national laws and traditions may inspire the Community principles of human rights).

142. *Id.* at 507, para. 13.

143. Case 7/76, 1976 E.C.R. 1213 (1976).



ECJ will annul any measure that is contrary to the view of human rights espoused by Germany or any other Member State.<sup>144</sup> In fact it has been suggested that the ECJ's protection of fundamental rights is more flexible than any other convention unifying the Member States would be.<sup>145</sup> This flexibility allows the ECJ to respond to changing circumstances, evaluate situations, and extend fundamental protections when necessary.<sup>146</sup>

Simply put, the more Member States extending a particular human right to their citizens, the more likely that right will receive acceptance by the Community. What is likely to be remembered about the ECJ's refusal to extend fundamental rights to undertakings in *Hoechst*, is that there was considerable disagreement among the Member States concerning the right in question.

Nevertheless, there are other recognized sources from which the ECJ should draw inspiration when considering embracing a fundamental right. International treaties constitute an important source for defining what rights are fundamental and will be protected by the Community. The Community should respect those rights that are treated as fundamental by treaties to which any Member State is a party or on which they have collaborated.<sup>147</sup>

Most importantly in this area is the recognition of rights outlined in the European Convention for the Protection of Human Rights and Fundamental Freedoms. As all Member States are parties, there is little question that it represents the Community view on human rights.<sup>148</sup> Although the Community is not itself a party, as it is not a state, there is much discussion as to whether it should be allowed to join.<sup>149</sup>

The aspect of the European Convention of Human Rights that is most pertinent to *Hoechst* is section 8 dealing with the right to privacy. Section 8(1) states "Everyone has the right to respect for his private and family life, his home and his correspondence." While the Court in *Hoechst*<sup>150</sup> limited that section to the application of natural persons,<sup>151</sup> *Panasonic*<sup>152</sup> interpreted this provision as extending fundamental rights of privacy to undertakings as well.<sup>153</sup> The ECJ in *Hoechst* ignored the dissimilar finding in *Panasonic* and offered no explanation for this apparent departure.

The distinction between an individual's privacy rights in the home and at work is well settled in tradition as well as in principle. The home has historically, and for good reason, been more stubbornly protected against public intrusions than has the business world. This distinction, which is the underpinning of *Hoechst*, appears reasonable enough, but may prove to be problematic. Consider for example a phenomenon that is becoming more common, the business that is operated out of a home. Should this type of business be treated as a conventional undertaking, or as a home for purposes of privacy protection against

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144. *Id.* at 1230-39 (Adv. Gen. Op.). The Advocate General's reasoning was as follows: Community law owes its existence to a partial transfer of sovereignty by the Member States to the Community, but since a Member State cannot be regarded as having included in that transfer the power to legislate contrary to rights protected by its constitution, it must be assumed that the Community has no power to infringe the rights embodied in the constitution of any Member State. HARTLEY, *supra* note 130, at 126 n.17.

145. Slynn, *supra* note 1, at 34.

146. *Id.*

147. HARTLEY, *supra* note 130, at 127.

148. Slynn, *supra* note 1, at 32.

149. *Id.*

150. Joined cases 46/87 & 227/88, 1989 E.C.R. 2859, 4 C.M.L.R. 410 (1991).

151. *Id.* at 2924, para. 18.

152. Case 136/79, 1980 E.C.R. 2033, 3 C.M.L.R. 169 (1980)

153. *Id.* at 2045.

Commission investigations? It is certainly persuasive that one's privacy expectations with regard to involvement in an undertaking may be less than in the home, but it does not necessarily follow that the expectation of privacy in the home is lessened because one opts to run a business from it. Given the characteristically broad interpretations the ECJ has placed on the Commission's powers, even bringing documents home from work would quite possibly entitle suspicious investigators to enter the home.<sup>154</sup>

This concern is strengthened by a history of inclusive and expansive findings as to what constitutes an undertaking.<sup>155</sup> It is quite possible for even a single person, whose activities only tangentially affect the Community economy, to be considered an undertaking under article 85, and therefore be subject to the intrusive investigations of the Commission.<sup>156</sup> At some point the deference to the Commission's power, in order to enable them to fulfill their duties, must be limited so as to give ample respect to the right of privacy of Community members.

Understandably the right of privacy cannot be absolute if the Community is to be expected to enforce any of its provisions. The European Convention of Human Rights itself recognizes the qualified nature of this right.<sup>157</sup> It may be that the public interest in enforcing articles 85 and 86 of the Treaty of Rome justifies the intrusion into an undertaking's privacy.<sup>158</sup> However, it is not difficult to imagine that the broad distinction drawn by the *Hoechst* decision, when coupled with the ambiguity of articles 85 and 86, and the ECJ's expansive interpretations of the Commission's powers, could lead to unwarranted or overinvasive infringements on personal privacy rights.

## VI. CONCLUSION

At least one author has noted that it might be wise for the ECJ to tread carefully as it deals with the heightened sensibilities of German litigants and German courts about the protection of fundamental rights within the Community legal order.<sup>159</sup> While German lawyers argue for increased respect for their fellow-citizen's constitutional rights in the

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154. Treaty of Rome article 14 does not draw a distinction between the privacy interests of the home or office as it allows officials to enter any premise. Treaty of Rome, *supra* note 1, art. 14.

155. See *Reuter v. BASF*, 1976 O.J. (L 254) 40, 2 C.M.L.R. D44 (finding an article 85 undertaking when a doctor engages in research and offers advice to third parties); *RAI v. UNITEL*, 1978 O.J. (L 157) 39, 3 C.M.L.R. 306 (concluding an article 85 undertaking exists when singers commercialize their artistic performances).

156. See RUDOLF GRAUPNER, *THE RULES OF COMPETITION IN THE EUROPEAN ECONOMIC COMMUNITY* 11 (1965) (arguing that an undertaking will be recognized where there is an economic unit, either a single individual, or several combined in partnership or corporation, which is concerned with the production or distribution of goods or provision of services).

157. Y.B. EUR. CONV. ON H.R. art. 8(2). The European Convention of Human Rights article 8(2) provides that:

There shall be no interference by a public authority with the exercise of this right [of privacy] except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

*Id.*

158. See *Case 136/79, National Panasonic (UK) Ltd. v. Commission*, 1980 E.C.R. 2033, 3 C.M.L.R. 169 (1980) (holding that while fundamental rights of privacy apply to an undertaking, such rights are overridden by the legitimate public interest of enforcing anti-competition laws).

159. Shaw, *supra* note 65, at 460.

Community forum, Germany itself has been notably supportive of its role as defined in the Treaty of Rome. The Germans offered a strong vote of confidence in favor of the EEC's authority when the German Federal Constitutional Court accepted the Community legal order as capable of providing adequate legal protection for fundamental rights without the need for intervention.<sup>160</sup> It remains to be seen whether the Community's courts will demonstrate that such confidence is deserved.

At the outset it seemed that Hoechst's case had very little chance of success. The Commission followed the investigation procedures outlined by the Treaty of Rome. The very basis upon which enforcement of the Community's competition laws would have called into question if Hoechst's rights had been found to have been infringed. Such a finding would have substantially compromised the Commission in fulfilling its duties in this area, and put businesses at a considerable advantage in concealing incriminating evidence.

Nevertheless, there is still a strong and growing concern that businesses under community law are insufficiently safeguarded against Commission investigations. And *Hoechst* will, if anything, increase those concerns. The requirement of respect for the relevant national procedural safeguards will likely be disregarded by the Court if it frustrates the effectiveness of the Commission. The dilemma of the small business run out of the home, along with numerous other individuals who fit into the expansive definition of undertaking under articles 85 and 86, who now enjoy less protection from intrusive Commission procedures, suggests that the Community should re-evaluate its balancing of interests.

If the Court seeks to look beyond the discrepancies among the protections afforded by the various Member States, and extends uniform Community protection, it seems to be free to adopt a model offering any level of protection. Further, the Court could streamline safeguards, preserving the element of surprise, by issuing warrants itself in place of the national authorities, thereby dispensing entirely with interim hearings. Such action would presumably increase the efficiency of the Commission's detection of article 85 and 86 violations, but it would cause increased concern and dissatisfaction among member states like Germany with strong common law constitutions. It would also perpetuate the arbitrariness of extending increased privacy rights to some individuals and not to others, without distinguishing between their expectations on a reasonable basis. Unfortunately this is the road most often traveled by the ECJ, as its extension of uniformity fails to adopt the more protective systems.

A better response would involve a strengthening rather than weakening of the safeguards. Community law should extend its recognition of those fundamental rights embraced by even the most protective Member State's constitution, thereby limiting the breadth of the *Hoechst* ruling. Membership in the Community should not come at the expense of the vital principles of a Member State's constitution. Rather, it is time for the Community law to live up to the trust placed in it by Germany and other states by adequately protecting their rights.

*Christian B. Green*

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160. Editorial, *Community Primacy and Fundamental Rights*, 12 EUR. L. REV. 161, 161-62 (1987).